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**IN THE
COURT OF APPEALS OF INDIANA**

JASON TYE MYERS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 79A05-0507-CR-405
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0306-FC-50

August 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jason Tye Myers (“Myers”) appeals from a jury conviction in Tippecanoe Superior Court of Class C felony battery resulting in serious bodily injury. He raises the following combined and restated issues:

- I. Whether sufficient evidence supports his conviction; and,
- II. Whether the trial court properly and appropriately sentenced him.

Concluding that sufficient evidence supports Myers’s conviction and that he was properly and appropriately sentenced, we affirm.

Facts and Procedural History

In the early morning hours of May 10, 2003, Felicia Norris (“Norris”) joined two friends at a bar in Lafayette. While there, she met Myers, her “on-again/off-again” boyfriend. Tr. p. 16. Norris and Myers discussed “hanging out later.” Tr. p. 17. Norris and her friends left the bar and returned to her apartment. Later, Myers and several of his friends joined them.

When the group got too loud, Norris asked everyone to leave. Meanwhile, Myers was upset and defensive because Norris was speaking with his brother. When Myers started to leave, Norris grabbed his arm because she wanted to talk to him. The two began to yell, scream, and push each other and Norris slapped Myers on the head several times. Myers pinned Norris against the wall and held her by the throat with both hands, so that her feet were barely touching the ground. One of Norris’s friends tried but was unable to pull Myers away from Norris. Myers struck Norris in the nose with his fist, causing a compound nasal fracture.

Myers then fled the apartment. A short time later, he called Norris to check on her. He told her to go to the hospital, but threatened to kill her and everyone in the house if she pressed charges against him. Tr. p. 23. As the result of her injuries, Norris received five stitches, suffered bruising, swelling, and pain, and later underwent surgery.

On June 20, 2003, the State charged Myers with Class C felony battery resulting in serious bodily injury, Class A misdemeanor battery, Class D felony confinement, and Class D felony criminal recklessness resulting in serious bodily injury. A jury trial commenced on June 28, 2005, and the jury convicted Myers of Class C felony battery resulting in serious bodily injury and Class D felony criminal recklessness resulting in serious bodily injury. The trial court merged the criminal recklessness conviction into the battery conviction and sentenced Myers to seven years. Myers now appeals.

I. Sufficiency

Myers challenges the sufficiency of the evidence, contending that the State failed to rebut his claim of self-defense. A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. Ind. Code § 35-41-3-2(a) (2004); Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). When reviewing a question of whether the State negated a defendant's claim of self-defense beyond a reasonable doubt, our standard is the same as in any other challenge to the sufficiency of the evidence. Martin v. State, 784 N.E.2d 997, 1006 (Ind. Ct. App. 2003). We neither reweigh the evidence nor determine the credibility of the witnesses. Id. We look solely to the evidence most favorable to the verdict together with all reasonable inferences to be drawn therefrom. Id.

A defendant's conviction, despite a claim of self-defense, will not be reversed unless no reasonable person can say that the State negated the claim beyond a reasonable doubt. Id.

In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson, 770 N.E.2d at 800 (citing McEwen v. State, 695 N.E.2d 79, 90 (Ind. 1998)). When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. Id.

Here, Myers admitted on cross-examination that he was a "pretty strong guy" and had been able to lift Norris up by her the throat with one hand. Tr. p. 107. Myers also testified that he did not think Norris was going to render him unconscious, and that his fear was that "she was gonna keep me in the house." Tr. p. 114. Thus, the State presented ample evidence from which the jury could conclude beyond reasonable doubt that Myers could not have entertained the good faith belief that he was in danger of death or great bodily harm.

Moreover, "[w]here a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator." Hollowell v. State, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). In determining whether the degree of force that the defendant exerted exceeded the bounds justified to defend himself, the extent and severity of the victim's injuries are relevant. Martin, 784 N.E.2d at 1006. The jury could reasonably conclude that by

punching Norris in the face and breaking her nose, Myers used more force than necessary for self-defense. Sufficient evidence supports Myers's conviction.

II. Sentencing

A. Aggravating and Mitigating Circumstances

Myers contends that the trial court erred in its consideration and weighing of aggravating and mitigating circumstances. Generally, "sentencing determinations are within the trial court's discretion." Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). When our court is faced with a challenge to an enhanced sentence, we must "determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances." Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied.

At the time of Myers's offense and sentencing, Indiana Code section 35-50-2-6 provided that a person who commits a Class C felony be sentenced to a presumptive term of four years, with not more than four years added for aggravating circumstances or not more than two years subtracted for mitigating circumstances.¹

Here, the trial court found the following aggravating circumstances: Myers's criminal history, which included five prior convictions, his history of substance abuse, his negative attitude, the fact that he was arrested while out on bond on this offense, and that

¹ Between the date of Myers's offense, May 10, 2003, and the date of sentencing, September 29, 2005, Indiana Code section 35-50-2-6 was amended to provide for an "advisory" sentence rather than a presumptive sentence. See P.L. 71-2005, § 9 (eff. April 25, 2005). The amendment to section 35-50-2-6 constitutes a substantive change in a penal statute and may not be applied retroactively. Therefore, in this case, we are required to apply the prior "presumptive" sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1071-72 (Ind. Ct. App. 2006), trans. denied. But see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

he is in need of correctional or rehabilitative treatment that can best be provided by a penal facility. Tr. pp. 161, 167; Appellant's App. p. 7.

At the sentencing hearing, the trial court observed, "[t]he big aggravators are in his adult criminal history, which is extensive[,] and there's a long history of substance abuse." Tr. p. 167. The trial court also found as a mitigating circumstance that Myers's Level of Services Inventory score indicated he was at a low risk of reoffending.² The court determined that the aggravating circumstances outweighed the mitigating circumstance, and imposed a seven-year sentence.

Myers acknowledges that the trial court could properly consider his criminal history as an aggravating factor, but argues that the remaining aggravating circumstances cited by the court are improper.³ We note, however, that a single aggravating circumstance may justify enhancing a sentence, although the existence of any one aggravator does not automatically justify a maximum sentence and judges must consider the weight warranted by each aggravator. Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005).

"The significance of a criminal history 'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" Id. (quoting Wooley v. State, 716 N.E.2d 919, 929 n. 4 (Ind. 1999)). When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether

² Myers acknowledges in his brief that the LSI-R actually placed him in the "Moderate/High" risk category. Br. of Appellant at 13. See Appellant's Green App. p. 7.

³ Myers also contends that his sentence violates Blakely v. Washington, 542 U.S. 296 (2004), because his sentence was based on aggravators that were determined by a judge, not a jury. However, the trial court could properly rely on Myers's prior convictions to enhance his sentence; thus there is no Blakely violation.

the remaining circumstance or circumstances are sufficient to support the sentence imposed. Cotto v. State, 829 N.E.2d at 525.

Myers contends that his prior convictions do not represent a “prior criminal orientation involving crimes of violence.” Br. of Appellant at 13. We note that Myers has five misdemeanor convictions for theft, false informing, possession of paraphernalia, and operating a vehicle having never received a license. While these convictions do not involve violence, we note that Myers committed theft and false informing after the battery at issue here. See Appellant’s Green App. p. 4. Therefore, Myers’s criminal history is deserving of aggravating weight.

In addition, Myers argues that the trial court failed to consider several mitigating factors, namely that he had obtained his GED, was six months away from earning an HVAC certification, and that Norris had written to the court indicating that she did not wish Myers to go to prison.

However, the finding of mitigating factors is not mandatory and rests within the discretion of the trial court. Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), trans. denied (citing O’Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999)). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. Id. (citing Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002)). Nor is the court required to give the same weight to proffered mitigating factors as the defendant does. Id. Moreover, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Id. (citing Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001)).

Here, the record indicates that Myers completed his GED right after this incident. Tr. p. 158. While he stated at the sentencing hearing that he had taken additional courses and was six months away from earning his HVAC certification, Myers was unable to answer how many credits he had earned or to provide any records to the court. See Tr. pp. 158-59. Finally, Norris's letter was not addressed to the sentencing court, but rather to Myers. In it, she wrote "An[d] 'No' I don't wish prison on you or anybody for that fact so I hope that answer's [sic] your question." Ex. Vol. Def.'s Ex. 2, p. 2. The trial court did not abuse its discretion when it declined to find these circumstances to be mitigating.

Therefore, we conclude that Myers's prior convictions, in the absence of any significant mitigating circumstances, are sufficient to support his enhanced, but not maximum, sentence for Class C felony battery resulting in serious injury.

B. Inappropriate Sentence

Finally, Myers argues that his enhanced seven-year sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2005); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

The record reveals that, after holding Norris by her throat against the wall of her apartment, Myers struck her in the face with his closed fist, causing Norris to suffer a compound nasal fracture requiring surgery. He then immediately fled her apartment and

later threatened to kill everyone in the apartment if she pressed charges. Under these facts and circumstances, we cannot conclude that his seven-year sentence is inappropriate.

Conclusion

Sufficient evidence supports Myers's conviction for Class C felony battery resulting in serious bodily injury. The trial court properly and appropriately sentenced Myers.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.